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UNCLAS SECTION 01 OF 06 HONG KONG 000382

SENSITIVE
SIPDIS

STATE FOR EEB/IPE/TMCGOWAN, JURBAN
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TAGS: [KIPR](#) [PGOV](#) [ETRD](#) [EFIN](#) [EINV](#) [CH](#) [HK](#)
SUBJECT: 2009 SPECIAL 301 RECOMMENDATION FOR HONG KONG

REF: A. STATE 8410
[B](#). 08 HONG KONG 1775
[C](#). 08 HONG KONG 2121

Post Recommendation and Summary

[1](#)1. (SBU) Post recommends that Hong Kong be excluded from the 2009 Special 301 list (ref A). Hong Kong authorities with specific responsibility for intellectual property rights (IPR) administration, education and enforcement are generally responsive to rights-holders' concerns and are active and effective partners in efforts to protect intellectual property. The Hong Kong Government (HKG) effectively combats online piracy and trade fair infringement, and acts on industry information about counterfeit goods. While Hong Kong in many ways remains a model for IPR protection, the government needs to do more to combat transshipment of counterfeit goods, create a system for copyright registration verification, do a better job of protecting patented pharmaceuticals, streamline its system for handling trademark infringements, and stiffen sentences for convicted IP infringers.

[1](#)2. (SBU) Summary: The HKG continues to maintain an effective IPR protection regime. Several useful amendments to the Copyright Ordinance were enacted in 2007 and took effect in July 2008. The amendments addressed industry concerns about circumvention of technical protection measures and established criminal liability for directors of companies using infringing products in business. The HKG announced in late 2008 its intent to enact key fair use and safe harbor provisions in 2009 legislation. In August 2008, the HKG Commerce and Economic Development Bureau (CEDB) concluded its consultations regarding follow-on statutory amendments to address "Copyright Protection in the Digital Environment." U.S. industry representatives criticized the CEDB's proposed amendments with regard to penalty levels for uploading and downloading of infringing works, Internet Service Provider (ISP) identification of copyright-infringing subscribers, statutory damages for copyright claims, and secondary liability of ISPs (ref B). In July 2008, the CEDB established a Tri-Partite Forum among ISPs, content providers and content users designed to facilitate implementation of a voluntary framework for digital IPR protection. Pending the outcome of Tri-Partite Forum discussions, the HKG postponed enactment of statutory amendments governing IPR protection in the digital realm (ref C).

[1](#)3. (SBU) Summary Cont'd: The sale and shipment through Hong Kong of counterfeit pharmaceuticals remains a pressing concern for U.S. firms, as does the continued marketing of patent-infringing pharmaceuticals. Transshipment of other

infringing products from mainland China is also increasing, despite notable HKG efforts at greater surveillance and interdiction. Immediate measures are needed to close loopholes that allow "shadow companies" to register under the Hong Kong Companies Registry. Most prosecutions of IP crimes result in convictions, but sentences are typically light and are not strong deterrents to illegal activity. End Summary.

Background

¶4. (SBU) The HKG's Intellectual Property Department (IPD), which includes the Trademarks and Patents Registries, is the focal point for the development of Hong Kong's intellectual property regime. The Customs and Excise Department (CED) is the principal IPR enforcement agency. CED officers are armed and hold police powers to search and arrest suspected IPR infringers.

Copyright Law Amendments Boost IPR Protection

¶5. (SBU) The passage of long-awaited amendments to the Copyright Ordinance in June 2007 was a significant step forward for IP protection in Hong Kong. The amendments took effect in July 2008. The government addressed industry concerns about the circumvention of technical protection measures (TPMs), included provisions for Director Liability, and reached a compromise with industry on the issue of parallel imports. Businesses providing circumvention of technical prevention measures as part of their business can now be held criminally liable. Any person circumventing

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technical protection measures can be held civilly liable under the amended law. While exceptions are allowed, industry does not believe these are so broad as to undermine the effectiveness of the law. Directors and partners can be held criminally liable for the infringing activities of their companies, but the new law allows them to escape liability if they can show they did not authorize and took steps to prevent such activities. The amendments relaxed restrictions on parallel imports, reducing the period in which parallel imports are prohibited from 18 to 15 months. This was a compromise with industry; the original draft bill called for the prohibited period to be cut to nine months.

¶6. (SBU) Exclusions for Education: Industry representatives are pleased that the HKG proposed extending criminal liability for the copying and distribution of copyright infringing printed works. CED continues to raid illegal copy shops that produce infringing copies of copyrighted works (most recently, at the beginning of Fall 2008 and Winter 2009 semesters). Industry stakeholders remain concerned about the scanning of printed copyrighted material and its subsequent distribution by email in university and school settings. Some Hong Kong universities have begun to publicize university honor codes prohibiting students from engaging in copyright infringing activities. Industry groups are conducting IPR outreach programs on university campuses, but universities continue to be centers for IP infringement.

¶7. (SBU) Fair Use/Safe Harbor Provisions: Fair use provisions have been criticized by industry as too broad and open to abuse by for-profit educational institutions (numerous in Hong Kong). In December 2008, the HKG announced its intention to enact amendments governing the maximum allowable safe harbor quantities and dollar values of physically reproduced copyrighted materials. Industry observers will comment on specific provisions in the HKG's safe harbor amendments, as they move toward LegCo debate and possible enactment in 2009. Exceptions to the fair use and safe harbor provisions will likely be included for government-supported schools and non-profit educational establishments.

¶8. (SBU) Technological Protection Measures: Industry continues to voice concerns about full protection of all access controls used in connection with the copyright of a work, and the scope of the "further exceptions by notice" within the final Copyright Ordinance legislation. The pace of technology and market practices requires industry to consult with government on each proposed exception for the law to effectively protect IP. Post will continue to monitor implementation of this provision.

¶9. (SBU) Parallel Imports: The Copyright Ordinance amendments shortened the period during which parallel imports can attract criminal liability from 18 months to 15 months. The amendments included provisions on presumptions and affidavit evidence to facilitate criminal enforcement. The HKG continues to suggest its intent to fully liberalize the use of parallel imports of copyrighted works in future legislation.

Further Amendments to Protect Digital IP

¶10. (SBU) In December 2006, the government released a consultation paper to seek public views on more effective copyright protection in the digital environment. The HKG sought comments on the following measures: legal liability for unauthorized downloading and uploading activities; protection of copyright works transmitted via all forms of communication technology; the role of the ISP in combating Internet piracy; facilitation of copyright owners in civil action against online infringement; statutory damages for copyright infringement; and copyright exemption for temporary reproduction of copyright works. Based on over 600 comment submissions from ISPs, content users and copyright owners, the CEDB in April 2008 presented seven specific proposals to strengthen the Copyright Ordinance. During the ensuing public comment period that ended on August 31, 2008, U.S. industry representatives cited several perceived weaknesses in CEDB's proposals. Specifically, the CEDB proposals: do not criminalize unauthorized downloading and peer-to-peer (P2P) file-sharing activities; allow an exemption (using TRIPS-compliant criteria) for temporary storage of copyrighted works by ISPs; envision continued reliance on

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expensive, court-ordered "Norwich Pharmacal" procedures to force ISPs to identify alleged infringers; and do not include statutory damages for copyright infringements.

¶11. (SBU) In July 2008, the CEDB established a Tri-Partite Forum (including ISPs, content providers, and content users) tasked with creating a voluntary code of conduct governing the electronic copying and transmission of copyrighted materials. Pending the outcome of efforts to create a voluntary framework of digital IPR protection through the Tri-Partite Forum, the HKG has delayed LegCo consideration of its proposed statutory amendments to the Copyright Ordinance.

U.S. industry representatives voiced concern that a voluntary code of conduct would prove unenforceable, even if agreed upon during 2009. Post continues to monitor the Tri-Partite Forum process and urge the HKG and legislators to further reinforce - not weaken - Hong Kong's strong IP regime.

Business Software End-Use Piracy

¶12. (SBU) According to the Business Software Alliance's (BSA) global piracy study, Hong Kong continued to have a high rate (51 percent) of illicit business software end-use in 2007, with industry claiming losses of USD 224 million that year (the latest figures available). This rate remains quite high for a developed economy like Hong Kong, with comparable regional economies (Singapore, Taiwan and South Korea) having rates 8-14 percentage points lower. Hong Kong's business software piracy rate declined slightly in 2007, in part related to efforts by Hong Kong's Intellectual Property

Department (IPD) to redirect its educational outreach program toward Small and Medium Enterprises (SMEs).

¶13. (SBU) In October 2006, IPD teamed up with BSA to set up the "Genuine Business Software Campaign", with the aim of educating businesses on the value of Software Asset Management (SAM) and combating corporate software piracy in Hong Kong. The first year's success, combined with the impending implementation of director liability provisions, spurred the October 2007 launch of the "Software Asset Management (SAM) Consultancy Programme" to provide free on-site consulting to SMEs and non-profits for effective management, control and protection of business software assets. Information can be found at: www.samhelp.hk. During the ten months ended July 31, 2008, the BSA and IPD approached over 50,000 companies to provide education about the program. 648 companies joined the program and educated their personnel in detail about SAM. In September 2008, the BSA presented a senior IPD official with an award for "Government Best Practices, Asia Pacific" related to the HKG's efforts to combat business software piracy. Director liability provisions went into effect in Summer 2008. Industry observers anticipate further improvement in Hong Kong's business software piracy rate, as Hong Kong Customs enforces Copyright Ordinance amendments that hold company directors criminally liable for pirated software use in their firms, and as the benefits of the Genuine Business Software Campaign accrue.

Pharmaceutical Counterfeits and Patent Linkage

¶14. (SBU) Industry surveys and recent CED raids on pharmacies suggest that counterfeit pharmaceuticals continue to be a serious problem in Hong Kong. Judges - who possess wide leeway in sentencing - often levy light penalties against infringing pharmaceutical retailers. The maximum penalties for selling counterfeit drugs are no different than those for any other retail product (a fine of up to USD 64,000 and 5 years imprisonment). Most retail cases are settled on the magistrate level, resulting in suspended jail terms and minimal fines. CED and IPD claim that strict separation between the judiciary and the government administration makes it difficult for the HKG to urge judges to issue stronger penalties, although government is conducting educational campaigns on fake drugs to build awareness of the health dangers of the problem.

¶15. (SBU) According to industry representatives, counterfeit pharmaceuticals from other countries (particularly within the Asia-Pacific region) are being imported in increasing quantities into Hong Kong. Counterfeit pharmaceuticals are then re-packaged to appear similar to legitimate pharmaceuticals registered in Hong Kong. The industry has a

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mechanism to share intelligence with CED, but complains that CED does not always reciprocate by sharing intelligence with industry on the status of specific cases. Nonetheless, CED's continued raids on pharmacies and arrests of vendors indicate CED's commitment to combat fake pharmaceuticals. In addition, customs officials partnered in 2008 with four Hong Kong Internet Service Providers (ISPs) to prevent the sale of counterfeit pharmaceuticals and other infringing products on Internet auction sites. Pharmaceutical industry representatives note that their relationship with CED remained strong in 2008.

¶16. (SBU) In 2008 CED investigated a total of 46 cases involving retail sale of counterfeit pharmaceuticals and seized USD 43,226 worth of infringing products in retail stores, compared with 27 cases and seizures totaling USD 2.6 million in 2007 (Note: USD 2.5 million of the 2007 total was seized in a single case). CED scored its largest success of 2008 with the break-up of a syndicate that imported counterfeit pharmaceuticals from Mainland China into Hong

Kong. In July 2008 the CED raided the Hong Kong apartment where the fake pharmaceuticals were repackaged for sale to local pharmacies. The CED seized over 60,000 tablets with a street value of approximately USD 348,000. The CED arrested a 67-year-old man in the apartment who subsequently pleaded guilty and was sentenced to 20 months imprisonment.

¶17. (SBU) U.S. pharmaceutical companies remain concerned over a loophole in the HKG's Department of Health (DH) drug approval process that enables generic pharmaceuticals to be sold legally in violation of patent-owners' rights. The DH issues marketing approvals for generic drugs without verifying the status of the patent. The DH states that intellectual property concerns are the responsibility of other HKG agencies. IPD complains it has no role in the drug approval process. Although patent-holders can seek redress through legal action after a drug is approved, the DH should take measures to better protect the rights of patent-holders before it approves new products for the marketplace. A local industry association representing American and international firms continues to lobby the HKG to allow patent owners to begin legal action against infringing generics before the DH authorizes an application to sell a generic drug in Hong Kong. However, the HKG has shown no willingness to address this problem as no Department accepts jurisdictional responsibility.

Transshipments

¶18. (SBU) U.S. firms indicate that significant quantities of IPR-infringing products -- particularly pharmaceuticals, watches and pirated optical discs, primarily from mainland China -- move through Hong Kong on their way to other markets. In 2008 CED made six seizures of shipments transiting Hong Kong containing pirated or counterfeit goods; the seized shipments' aggregate market value was USD 382,000.

Most seizures are based on industry-provided intelligence directing CED to specific shipments, not from random searches. When possible, CED informs customs agencies in other countries if it possesses intelligence that infringing products transited Hong Kong and are destined for that country, but does not inform rightsholders about the status of on-going investigations.

Company Registry and "Shadow Companies"

¶19. (SBU) International and local companies remain critical of the HKG for registering new companies under names which infringe well-known trademarks. "Shadow companies" are typically shell companies that register with the Hong Kong Companies Registry under names that are designed to be confused with well-known registered trademarks. A complete revision of the Hong Kong Companies Ordinance is expected by 2012; however, immediate measures are needed to close loopholes that allow "shadow companies" to register international brand names as part of their own name (i.e., Hong Kong Coca Cola International, Ltd). Currently, the Registry does not conduct a trademark or registration check before accepting a company registration; the only recourse for victims is through lengthy court action to force a name change by the infringing companies. The Registry stated in October 2008 that it intends to examine the mandatory use of one or more independent arbitration companies, as a means to

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resolve shadow company disputes outside the court system.

Education

¶20. (SBU) The HKG's Intellectual Property Department (IPD) conducts a wide range of public education efforts to encourage respect for intellectual property rights, including seminars, exhibitions and public lectures. In 2008, IPD

continued its "I Pledge" and "No Fakes" campaigns. In the former, consumers promise not to buy infringing products and, in turn, receive preferential access to local concerts and shows. In the latter, local retailers pledge to not sell counterfeit goods and, in return, they can display a "No Fakes" sign in their shop windows and tourist and business chambers feature them in promotional material. IPD also continued its IP Tutor program for schools, providing IPR training to teachers, who then conduct IPR awareness classes for intermediate school students. IPD intensified its IPR protection cooperation with officials in Guangdong Province, and with mainland China's State Intellectual Property Office (SIPO). By the end of 2008, the "No Fakes" campaign had been introduced in eight Guangdong cities. Further details concerning these cooperative efforts can be found at: <http://www.ipd.gov.hk/eng/ip cooperation corner.htm>.

¶21. (SBU) IPD and CED also continued their "Youth Ambassadors Against Internet Piracy" program involving an estimated 200,000 children and teenagers who search for online IPR violations and report them to a special CED website (1,652 violations reported to date). In addition, in 2007, CED opened the "IPR Enforcement Museum," a HKD 2 million, 235-sq.km facility for public education. CED also regularly publicizes news of enforcement actions, raids, and the judicial punishments levied against infringers. As a result, awareness levels of Hong Kong's IPR laws rose to 91.6 percent in 2008 from just 55.2 percent in 1999, while 96.3 percent of respondents considered it necessary to protect IP rights in Hong Kong, according to IPD's bi-annual survey.

Enforcement

¶22. (SBU) CED launched a "Lineament Monitoring System" in March 2007 to conduct round-the-clock monitoring of online BitTorrent (BT) infringement activities. Only one new case of infringement activity in Hong Kong using BT technology was detected in 2008. The "Fast Action Scheme" was initiated in 2006 for IPR enforcement at large-scale exhibitions and trade shows. CED arrested five individuals in 2008 at the jewelry, toy and electronic shows. The Department established two "Anti-Internet Piracy Teams" in 2000 and 2004 respectively, which in 2008 detected 31 Internet infringement cases, up from 27 cases in 2007.

¶23. (SBU) CED continued aggressively raiding retail level shops for counterfeit and pirated goods. In 2008, CED reported handling 9,505 copyright infringement cases, including 7,679 piracy cases (mostly related to optical discs) and 1,826 cases of trademark counterfeiting. A total of 1,841 persons were arrested, with goods seized worth over USD 32.3 million (including almost 2.2 million pirated optical discs). CED estimates that the number of shops selling pirated optical discs has fallen to approximately 25 establishments, but dispersed sales of infringing products by street vendors and illegal immigrants remain a problem. An April 2008 raid by CED of an underground production facility resulted in the seizure of 110 DVD writers, 27,000 optical discs, and the convictions of two defendants; they each received 24 month prison terms. In June 2008, following a year-long investigation, CED raided 17 locations in Hong Kong and seized over 12,000 pirated optical discs that had been smuggled in from Mainland China. CED arrested 22 individuals and seized cash, jewelry and two cars worth USD 800,000 during the operation.

¶24. (SBU) In September 2008, CED arrested seven individuals at a cyber caf and travel agency, after the companies were identified as using pirated business software. Under Hong Kong's newly enforceable amendments to the Copyright Ordinance, the companies' directors and partners face a maximum penalty of four years in jail and a USD 6,500 fine for each infringing software copy identified by CED.

Judicial System Results

¶25. (SBU) During 2008, the judiciary handed down 525 convictions in 671 cases involving violations of trade description laws -- a conviction rate of over 78 percent. One hundred twenty-five of these individuals received prison sentences (almost all under one year), and 358 were assessed fines (almost all less than USD 6,500). The judiciary handed down 910 convictions in 989 copyright cases -- a 92 percent conviction rate. These cases resulted in 672 prison sentences (almost all under one year), and 93 fines (almost all less than USD 6,500). Post supports the HKG's enforcement actions against trademark infringements and copyright piracy and urges the HKG to consider tougher sentencing that will serve as a deterrent to intellectual property violators.

Compliance With International Agreements

¶26. (U) Hong Kong has filed its notice of compliance with the trade-related intellectual property (TRIPs) requirements of the World Trade Organization. Hong Kong has acceded to the Paris Convention for the Protection of Intellectual Property, the Bern Convention for the Protection of Literary and Artistic Works, and the Geneva and Paris Universal Copyright Conventions. Hong Kong also continues to participate in the World Intellectual Property Organization as part of Mainland China's delegation. The World Intellectual Property Organization Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) apply to the Hong Kong Special Administrative Region with effect from October 1, 2008. The HKG states its copyright legislation is currently in full compliance with the international standards contained in the two treaties.
DONOVAN